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15 **UNITED STATES DISTRICT COURT**

16 **NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION**

17  
18 United States of America,

19 Plaintiff,

20 vs.

21 Twitter, Inc.,

22 Defendant.

Case No. 3:22-cv-3070-TSH

**X CORP.'S REPLY IN SUPPORT OF  
MOTION FOR PROTECTIVE ORDER &  
RELIEF FROM CONSENT ORDER**

**Hearing Date:** November 16, 2023

**Hearing Time:** 11:00 AM

**Hearing Location:** Courtroom E, 15th Floor  
450 Golden Gate Avenue  
San Francisco, CA

The Hon. Thomas S. Hixson

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1 X Corp., successor in interest to Defendant Twitter, Inc. respectfully submits this reply in  
 2 support of its motion to terminate, modify, or stay enforcement of the Consent Order that is subject  
 3 to this Court’s jurisdiction by virtue of the Stipulated Order and for a protective order staying the  
 4 Notice of Deposition of Elon Musk issued by the Federal Trade Commission (“FTC”).

### 5 **PRELIMINARY STATEMENT**

6 Although the government’s Opposition largely tries to change the subject, the unrebutted  
 7 evidence shows staggering misconduct that fundamentally undermines the parties’ settlement.  
 8 Lawyers at the FTC—a federal agency tasked with protecting consumers from unfair and deceptive  
 9 trade practices and other unscrupulous conduct—“tr[ie]d to influence the outcome of” a court-  
 10 mandated independent assessment by (1) conveying “expectations ... about what th[e] results should  
 11 be before [the assessor, Ernst & Young LLP (“EY”)] had even begun any procedures”; (2) providing  
 12 “a list of specific[] ... types of procedures they were expecting [EY] to execute”; and ultimately  
 13 (3) communicating in “very adamant” terms “absolutely what [EY] will do”—including “produce a  
 14 report” that “would conclude that there were deficiencies in Twitter’s privacy and information  
 15 security program.” Dkt. 18-14 at 121:20–122:2, 123:8-10, 201:2–12, 202:9–203:1.  
 16 Contemporaneous written communications within EY memorialize the chilling effect this had.  
 17 EY’s senior partner and engagement lead, David Roque, described how, by “pressuring [EY] to  
 18 reach a specific outcome,” the FTC’s conduct created an “[u]ndue influence threat” that interfered  
 19 with EY’s “ab[ility] to be objective.” Dkt. 18-15. And he discussed his worry that, if EY responded  
 20 to the pressure by resigning from its position, “[t]he FTC [will] take[] exception to our withdrawal  
 21 and create[] ‘other’ challenges for EY over time[.]” Dkt. 18-17.

22 In its Opposition, the Justice Department hardly defends the FTC’s conduct. It does not  
 23 question Mr. Roque’s credibility. It does not dispute the veracity of the documentary corroboration.  
 24 It does not offer contrary evidence of the FTC’s good faith. Its failure to do so is a concession that  
 25 the FTC attempted to coerce EY into becoming an investigatory arm of the agency and generating  
 26 evidence the FTC could use to charge the targets of its investigation.

27 Remarkably, the government’s central response is that X Corp. should have *expected* the  
 28 misconduct because the FTC and X Corp. are adversaries in this litigation. That is both alarming

1 and baseless. While it is true that the government sued X Corp. in 2022, the government agreed—  
 2 as part of an order that it asked this Court to enter—that an “independent” and “objective” assessor  
 3 would evaluate X Corp.’s compliance with the terms of the parties’ settlement. The FTC’s efforts  
 4 to compromise the assessor’s independence and objectivity can no more be justified by invoking  
 5 adversarial litigation than could efforts to compromise the independence and objectivity of an  
 6 arbitrator or judge overseeing compliance with a settlement. The FTC’s egregious misconduct is a  
 7 material change in circumstances and a flagrant violation of the parties’ agreement—both of which  
 8 are grounds for this Court to vacate or modify the Consent Order as outlined in X Corp.’s motion.

9 The FTC counters with a procedural argument, contending that X Corp. would remain  
 10 subject to the Consent Order even if the Court were to vacate the Stipulated Order. But that  
 11 argument misunderstands the relationship between the relevant orders. The Consent Order is a  
 12 product of—and expressly integrated into—the Stipulated Order that this Court entered after *the*  
 13 *FTC* brought the case in this forum, and over which this Court has continuing jurisdiction. Just as  
 14 the Court had power to incorporate the Consent Order, it retains power to vacate or modify the  
 15 Consent Order. The FTC cannot have it both ways, invoking the power of this Court to enforce the  
 16 Consent Order when convenient, but then denying the power of the Court over the same Order when  
 17 that approach suits its purposes.

18 This Court should reject the argument that it is powerless to sanction brazen government  
 19 misconduct or remedy the resulting harm. The Court should terminate or modify the Consent Order,  
 20 stay the deposition of Elon Musk, and compel the FTC to respond to X Corp.’s discovery demands.

## 21 **ARGUMENT**

### 22 **I. THE FTC’S EXTRAORDINARY MISCONDUCT WARRANTS TERMINATION** 23 **OR MODIFICATION OF THE CONSENT ORDER.**

#### 24 **A. The Justice Department’s Attempt to Minimize the Severity of the FTC’s** **Misconduct is Unavailing.**

25 The FTC’s attempts to manufacture evidence by influencing the independent assessment of  
 26 X Corp.’s privacy, data protection, and information security program are egregious government  
 27 misconduct justifying X Corp.’s requested relief. Mr. Roque’s testimony was unambiguous: FTC  
 28 staff “kept expressing their opinion more and more adamantly about the extent of procedures [EY]

1 would need to perform” and declaring their “expectations around the results they would expect [EY]  
 2 to find[.]” Dkt. 18-14 at 121:11–19. FTC staff was “adamant about this is absolutely what you will  
 3 do and this is going to occur, and you’ll produce a report at the end of the day” that “would conclude  
 4 that there were deficiencies in Twitter’s privacy and information security program.” *Id.* at 201:5–  
 5 8, 20–23. Mr. Roque found this so unusual that it “raised a personal concern that ... the FTC was  
 6 trying to influence the outcome of the engagement before it had started[.]” *Id.* at 121:20–22.

7 This testimony leaves no legitimate doubt that the FTC improperly attempted to influence  
 8 the content and outcome of the independent assessment, which the FTC itself concedes is meant to  
 9 be “truly objective—*i.e.*, unaffected by the interests (or litigation positions) of either the respondent  
 10 or the FTC.” Dkt. 18-1 at 3; *see also* Opp. 18–19 (recognizing that the parties negotiated for an  
 11 “objective, independent, third-party assessment” because “neither party considered the other to be  
 12 an objective, independent observer”). That extraordinary changed circumstance alone renders the  
 13 Consent Order unworkable and is enough to warrant relief under Rule 60(b)(5), as other courts have  
 14 recognized under analogous circumstances. *Thompson v. U.S. Dep’t of Housing & Urban Dev.*,  
 15 404 F.3d 821, 825 (4th Cir. 2005) (affirming decision that “the magnitude of the [government  
 16 defendants’] non-compliance amounted to a change of circumstance sufficient to warrant  
 17 modification” of consent order).<sup>1</sup> The FTC’s attempts to subvert a core part of the parties’  
 18 agreement also amount to repudiation of the plain text of the Consent Order, which itself is an  
 19 “extraordinary circumstance” justifying relief pursuant to Rule 60(b)(6). *Keeling v. Sheet Metal*  
 20 *Workers Int’l Ass’n*, 937 F.2d 408, 410–11 (9th Cir. 1991) (affirming vacatur of judgment because  
 21 party’s conduct amounted to “repudiation or complete frustration of the settlement agreement.”).

22 The Opposition does nothing to change that conclusion. Rather, it confirms it.

23 **First**, the government does not seriously dispute that the FTC sought to influence EY to  
 24 reach an outcome that would be prejudicial to X Corp. Its half-hearted attempt to defend the FTC  
 25 consists principally of arguing that X Corp. “cherry-picked” the worst quotations from Mr. Roque’s  
 26

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27 <sup>1</sup> Unless otherwise indicated, this brief omits internal quotation marks, citations, alterations, and  
 28 omissions from legal citations.

1 testimony and applied a “hyperbolic” gloss to them. Not so. In any event, X Corp. provided the  
 2 entire transcript of Mr. Roque’s testimony with its motion, so the Court can judge for itself what  
 3 Mr. Roque’s testimony means. At a minimum, his testimony, along with the accompanying internal  
 4 EY discussions, easily rebut any suggestion that the FTC’s conduct was “benign” and that the “FTC  
 5 staff simply communicated an expectation that EY would issue an assessment” but did not convey  
 6 “other expectations from a ‘conclusion standpoint.’” Opp. 16. The government’s Pollyanna  
 7 reconstruction of the transcript is an exercise in whistling past the graveyard.

8 *Second*, lacking a basis to dispute what the FTC did, the government’s only genuine point  
 9 of contention is whether it is improper for a federal agency to engage in such conduct. The answer  
 10 to that question must be yes. The Opposition shows why.

11 Contrary to the facts, the government appears to suggest that X Corp. might have engaged  
 12 in the same type of misconduct if EY had failed to reach the company’s favored conclusion: “[I]f  
 13 EY had discovered problems in X Corp.’s data privacy and security program,” the government’s  
 14 argument goes, then “X Corp. might have preferred for those problems to remain hidden.” *Id.* at  
 15 16. But if the roles were reversed—and the FTC obtained testimony that X Corp. personnel had  
 16 “pressur[ed] [EY] to reach a specific outcome” that would be positive to X Corp.—the FTC would  
 17 have treated this as serious misconduct, potentially including a referral to the Justice Department’s  
 18 Consumer Protection Branch for criminal obstruction of an official proceeding. Dkt. 18-15 at 1.  
 19 Those same Justice Department representatives cannot be heard to argue that such actions are the  
 20 “unremarkable” or “fully expected” results of an “adversarial situation.” Opp. 16, 18.

21 More fundamentally, the government’s suggestion that X Corp. should have “fully expected  
 22 the perceived ‘bias,’ [] that it now alleges” because of the “adversarial situation” between the  
 23 company and the FTC (Opp. 16, 18) is alarming and misguided. The presence of an adversarial  
 24 relationship in litigation is no excuse for attempting to influence an assessor the parties agreed must  
 25 be independent and objective. Virtually every settlement is the result of agreement by adversaries  
 26 in litigation; if the underlying adversity justified attempts to gain an advantage by disregarding the  
 27 agreement, then settlements would have little value. The Court should decline the government’s  
 28 invitation to normalize the FTC’s heavy-handed tactics as an unexceptional feature of our adversary



1 system. “While zealous advocacy is laudable, it has its limits.” *Lone Ranger Television v. Program*  
 2 *Radio*, 740 F.2d 718, 727 (9th Cir. 1984). The government “may strike hard blows, [but it] is not  
 3 at liberty to strike foul ones.” *Berger v. United States*, 295 U.S. 78, 88 (1935).

4 **Third**, the government’s suggestion that X Corp. is attempting to “preclud[e] FTC staff”  
 5 from engaging in any kind of *ex parte* communications with the independent assessor is an  
 6 unfounded attempt to distract from the real issue. Opp. 17. X Corp. never argued that the Consent  
 7 Order barred all *ex parte* communications between the FTC and the independent assessor, which X  
 8 Corp. made clear to EY were permitted. *See, e.g.*, Dkt. 18-14 at 116:6–11 (Mr. Roque testifying  
 9 that X Corp. informed EY it was “allowed to talk to the FTC if and when [EY] felt it was appropriate  
 10 or [the FTC] reached out to [EY] with questions.”). Rather, X Corp. argues that the FTC was not  
 11 free to use those *ex parte* communications to pressure the independent assessor to reach the FTC’s  
 12 predetermined outcome. *See* Mot. 14–19. The problem is not that the FTC spoke to the assessor;  
 13 the problem is what the FTC said.

14 The Opposition’s cited authorities thus miss the mark. *T.Y. v. Board of County*  
 15 *Commissioners*, for example, concerned whether one party could insist on a bar on *ex parte*  
 16 communications with an independent monitor where the underlying consent order contained no such  
 17 prohibition. 912 F. Supp. 1424, 1426–27 (D. Kan. 1996). But here, X Corp. is not seeking a gag  
 18 order. It is seeking relief from a consent order that the FTC has abused to further its biased,  
 19 predetermined investigation. *United States v. City of Albuquerque*, No. 1:14-cv-1025 RB-SMV,  
 20 2017 WL 5508519 (D.N.M. Nov. 16, 2017), is equally inapposite. The *Albuquerque* court rejected  
 21 “vague allegations regarding ‘the nature and frequency of communications between the Monitor  
 22 and DOJ attorneys’” because “[t]he Parties [had] not prohibited the Monitor from engaging in *ex*  
 23 *parte* communications.” *Id.* at \*6. By contrast here, X Corp. relies on specific, sworn testimony  
 24 from EY’s engagement partner about the content of the FTC’s communications.

25 **Finally**, the government’s suggestion that X Corp. should have negotiated different  
 26 settlement terms is similarly misguided. The Opposition acknowledges that the parties agreed that  
 27 the assessment must be “objective [and] independent.” Opp. 18. And the terms of the Consent  
 28 Order leave no room for doubt, stating expressly that the assessment “must be obtained from one or

1 more qualified, *objective, independent* third-party professionals” who must (among other things)  
 2 “conduct an *independent* review of” X Corp.’s program. Dkt. 11 at 15 (Section VI.A (emphases  
 3 added)). It is not clear what other settlement terms X Corp. could have negotiated that would have  
 4 more plainly required an objective and independent assessment. Where a “settlement agreement is  
 5 made, as here, under the eyes of the court, it is a most solemn undertaking, requiring the lawyers, as  
 6 officers of the court, to make every reasonable effort to carry it through to a successful conclusion.”  
 7 *United States v. Baus*, 834 F.2d 1114, 1124 (1st Cir. 1987). The Opposition cites no authority that  
 8 blesses the FTC’s attempt to subvert its acknowledged commitments because X Corp. failed to seek  
 9 prophylactic “protection[s]” against the specific type of misconduct the FTC committed. Opp. 18.

10 Moreover, consent orders are contracts, and “[t]he idea that a party may not rely on a contract  
 11 term because the other side can be expected to violate it cuts at the very heart of contract law.”  
 12 *Travelers Ins. v. Budget Rent-A-Car*, 901 F.2d 765, 768 (9th Cir. 1990). “[E]very contract includes  
 13 an implicit promise not to take an action that would deprive the other contracting party of the  
 14 benefits of their agreement.” *In re Facebook Consumer Privacy Litig.*, 402 F. Supp. 3d 767, 802  
 15 (N.D. Cal. 2019). That implied promise proscribes conduct that “though not prohibited, is  
 16 nevertheless contrary to the contract’s purposes and the parties’ legitimate expectations.” *Carma*  
 17 *Devs. v. Marathon Dev.*, 2 Cal. 4th 342, 373 (1992). The government’s paragraph-long string cite  
 18 defending witness tampering (Opp. 17–18) suggests it misunderstands this basic concept.

19 **B. The FTC’s Investigation is Tainted by Impermissible Bias.**

20 The FTC’s conduct leads to the inescapable conclusion that its investigation is motivated by  
 21 bias against X Corp. and its new owner rather than any lawful investigatory purpose. As noted, the  
 22 Opposition does not seriously dispute this bias, arguing instead that X Corp. should have “fully  
 23 expected the perceived ‘bias’” when agreeing to the Stipulated Order. Opp. 18. But X Corp.—then  
 24 Twitter, Inc.—could not have “actually [] anticipated” that the FTC would transform its compliance  
 25 monitoring into a tool for targeting and harassing the company’s subsequent acquirer, Elon Musk,  
 26 and successor entity, X Corp. *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 385 (1992). Nor  
 27 could X Corp. have anticipated that the FTC would attempt to subvert the independent assessment  
 28 in pursuit of those goals. X Corp. is “not required to anticipate every exigency that could

1 conceivably arise during the life of a consent decree,” and *Rufo*’s “heavy burden” standard is not  
 2 applicable. 502 U.S. at 385; *see also Thompson*, 404 F.3d at 828–29 (rejecting argument that party  
 3 to consent order should have anticipated governmental non-compliance).

4 Alternatively, the Opposition argues that X Corp. cannot show bias because the FTC claims  
 5 it was simply conducting routine investigations of X Corp.’s compliance with the Stipulated Order.  
 6 Opp. 14–15. This response only begs the question. The FTC cannot rebut evidence of bias simply  
 7 by pointing to a pretextual lawful purpose. *See, e.g., Torres Advanced Enter. Sols. v. United States*,  
 8 133 Fed. Cl. 496, 522 (2017) (“[P]ersonal animus or bias on the part of agency officials...latent  
 9 inconsistency in the existing record, or...some indication that the agency’s explanation is  
 10 pretextual” will suffice to place an issue before the court even when the “agency has provided for  
 11 its decision a reasonable explanation.”); *Bonnischen v. United States*, 217 F. Supp. 2d 1116, 1164–  
 12 65 (D. Or. 2002) (remanding a “consistently biased” agency action even when the conduct was  
 13 couched in a lawful pretext).

14 In any event, this justification crumbles under scrutiny. The Opposition’s factual narrative  
 15 tellingly skips from entry of the Stipulated Order in May 2022 straight to Mr. Musk’s acquisition of  
 16 the company at the end of October 2022. Opp. 4–5. In doing so, the government omits the explosive  
 17 allegations by Peiter Zatko, Twitter, Inc.’s former Security Lead who reported directly to Twitter’s  
 18 CEO. Mr. Zatko alleged that pre-Musk Twitter deliberately misled the FTC about the company’s  
 19 compliance with the 2011 Consent Order and was endangering user data. *See* Mot. 5–6. Yet instead  
 20 of focusing on those accusations, which relate to alleged misconduct occurring *before* Mr. Musk  
 21 acquired Twitter, the FTC’s depositions and rapid-fire demand letters have focused almost entirely  
 22 on what happened *after* Mr. Musk acquired the company. *See, e.g.,* Dkt. 18-7, 18-8, 18-9, 18-10,  
 23 18-14, 42-3, 42-4, 42-5, 42-6. The government attempts to justify the FTC’s focus by arguing that  
 24 post-acquisition changes “gave [the FTC] every reason” to investigate, Opp. 14, but it offers no  
 25 explanation for why the *possibility* that Mr. Musk’s changes might affect user privacy and security  
 26 merited so much more attention than Mr. Zatko’s *direct allegations* that pre-Musk Twitter had  
 27 misled the FTC and put users’ privacy and security at risk. The FTC’s inconsistency reinforces the  
 28

1 inference that its investigation is motivated by bias. The Opposition offers no alternative  
2 explanation for those facts.

3 In trying to justify the FTC’s drastic shift in interest in X Corp., the Opposition inadvertently  
4 demonstrates that bias against Mr. Musk lies at the heart of the investigation. The government  
5 recounts at length deposition testimony about “several concerning incidents involving Musk.” Opp,  
6 at 7. But that testimony resulted from the FTC’s persistent focus on eliciting evidence about *Mr.*  
7 *Musk* during its ostensible investigation of X Corp.’s compliance with the Consent Order. *See, e.g.,*  
8 Dkt. 42-3 at 64:4–6 (“Were there any other incidents or events or things you heard that caused you  
9 to have concerns about Mr. Musk’s leadership of Twitter?”); *id.* at 72:1–3 (similar); Dkt. 42-6 at  
10 132:13–16 (“Was it your sense that the priorities coming from Elon Musk and his team were in  
11 effect having the security issues slide further down the list of priorities?”); Dkt. 42-4 at 264:22–  
12 265:2 (“[D]id anything else happen that changed your opinion of Mr. Musk’s commitment to  
13 complying with the order?”). The FTC asked a former X Corp. security professional some variation  
14 of a question about “concerns” with Mr. Musk’s “leadership” no fewer than seven times during his  
15 deposition. *See, e.g.,* Dkt. 42-3 at 64:4–6, 72:1–3. In addition, the Opposition in some cases  
16 misleadingly quotes from the testimony. For example, the government cites testimony from the  
17 company’s former Chief Privacy Officer, Damien Kieran, that the privacy and security reviews of  
18 Twitter Blue were not “conducted in accordance with the company’s process for software  
19 development.” Opp. 8–9. But the government conspicuously omits Mr. Kieran’s *immediately*  
20 *preceding* testimony that he personally “ensured that the security and privacy reviews [of the Twitter  
21 Blue product] were appropriately conducted.” Dkt. 42-5 at 146:1–7. Far from demonstrating a  
22 neutral, lawful purpose, this investigatory conduct provides yet more evidence that the FTC’s  
23 investigation has been targeted at Mr. Musk personally all along.

24 In any event, objective evidence rebuts the FTC’s justification for harassing X Corp. On  
25 August 5, 2023, FTI—who replaced EY as X Corp.’s independent assessor—completed its  
26 assessment of X Corp.’s privacy, data protection, and information security program for the period  
27 from May 26, 2022 to May 25, 2023. FTI’s conclusions vindicated X Corp. According to FTI, “[X  
28 Corp.] has implemented and maintained a Program required by Provision V of the Order,” and “the

1 Program established and implemented by [X Corp.] is appropriate.” Ex. 21 at 7, 9. To be sure, the  
 2 assessment noted a number of exceptions and areas where X Corp. can improve. These observations  
 3 demonstrate the thoroughness of FTI’s assessment and lend credibility to its overwhelmingly  
 4 positive conclusions.

5 Finally, the government’s suggestion that any misconduct is harmless because EY ultimately  
 6 withdrew from the representation is a nonstarter. By violating the plain terms of the parties’  
 7 agreement, the FTC no longer has any basis to continue enforcing it. That the FTC would resort to  
 8 such conduct in the first place, moreover, is probative of its abuse of the Consent Order and its  
 9 disqualifying bias against Elon Musk and X Corp. It also demonstrates the risk that the FTC will  
 10 engage in similar misconduct unless it loses access to the tools contained in the Consent Order. This  
 11 is far from a theoretical danger: X Corp. must complete an independent assessment every two years,  
 12 Dkt. 11 at 15, and the FTC no doubt will interpret a denial of X Corp.’s motion as an endorsement  
 13 of its position that bullying an independent assessor is merely zealous advocacy that should “come  
 14 as no surprise” to X Corp. Opp. 19. Absent relief from this Court, there is little reason to believe  
 15 the FTC will not attempt the same approach again.

16 **C. Termination or Modification Are Appropriate Remedies.**

17 The FTC’s extraordinary misconduct represents a “repudiation or complete frustration” of  
 18 the settlement agreement reached by the parties, which “justifies vacating the court’s prior [] order.”  
 19 *Keeling*, 937 F.2d at 410–11 (vacating settlement between union and employer who repudiated the  
 20 agreement by “fail[ing] to comply with the settlement terms”); *see also Baus*, 834 F.2d at 1127  
 21 (remanding for evidentiary hearing and noting that “[a] material breach of [the government’s]  
 22 obligation would, of course, constitute an independent ground for vacating the judgment entered  
 23 pursuant to the settlement agreement”). If X Corp. had known that the FTC planned to violate the  
 24 letter and spirit of the Consent Order, it “would never have been executed” in the first place.  
 25 *Thompson*, 404 F.3d at 828. At a minimum, the Court should impose modifications “suitably  
 26 tailored to resolve the problems created” by the FTC’s misconduct, by stripping the FTC of the tools  
 27 it has abused. *See United States v. Asarco Inc.*, 430 F.3d 972, 979 (9th Cir. 2005). These include  
 28 the independent assessor provisions (Parts VI–VII) and the discovery provisions (Parts XI and XIII).

## 1 II. THE COURT HAS JURISDICTION OVER THE CONSENT ORDER

2 The government attempts to erect procedural roadblocks to granting X Corp.’s motion, but  
 3 these arguments are meritless. The Opposition contends that the Consent Order “is not properly  
 4 before the Court” (Opp. 11), but that is a remarkable assertion given that the government:  
 5 (1) invoked this Court’s jurisdiction by filing a civil complaint, Dkt. 1; (2) availed itself of that  
 6 jurisdiction by obtaining relief that only this Court could award, 15 U.S.C. § 45(l); and (3) asked  
 7 the Court to enter the Stipulated Order, which integrated the Consent Order, as a judgment over  
 8 which the Court retained jurisdiction. Dkt. 11 at 3–4, 8–22. This Court then exercised its  
 9 jurisdiction and entered the Stipulated Order (along with the Consent Order) in final judgment of  
 10 the government’s complaint, binding Twitter, its successors, and the government alike. *Id.* The  
 11 FTC thereafter continued to invoke this Court’s authority by taking discovery through subpoenas  
 12 and deposition notices bearing the Court’s name and case caption. *See, e.g.*, Dkt. 18-11, 18-12. But  
 13 now that X Corp. seeks relief on the same grounds available to any civil litigant in a federal court,  
 14 the government erroneously argues that this Court has no jurisdiction over the content of its own  
 15 order. Given the government’s repeated decisions to place this matter before the Court, it should be  
 16 estopped from advancing this argument. *See, e.g., U.S. ex rel. Turnkey Const. Servs., Inc. v. Alaskan*  
 17 *Contracting, LLC*, No. 13-CV-01654 TLN-CMK, 2013 WL 6503307, at \*3 (E.D. Cal. Dec. 11,  
 18 2013) (where “Plaintiff, not Defendant, invoked this court’s jurisdiction ... this court has jurisdiction  
 19 to enforce the terms of the very agreement that forms the basis of the claims Plaintiff asserts”).

20 In any event, the Stipulated Order’s express incorporation of the Consent Order places the  
 21 Consent Order squarely within this Court’s jurisdiction. Attachments “are an intrinsic part of the  
 22 decree and are to be given the same effect as the main document.” *Brill v. Wing*, 937 F. Supp. 170,  
 23 175–76 (N.D.N.Y. 1996); 11 Williston on Contracts § 30:25 (4th ed.) (when “a writing refers to  
 24 another document, that other document ... becomes constructively a part of the writing, and in that  
 25 respect the two form a single instrument”). The government filed the Stipulated Order and the  
 26 Consent Order as a single, integrated document, and the Court entered them in a single document  
 27 and docket entry. Dkt. 11. The Consent Order thus should “be given the same effect as the”  
 28 Stipulated Order, over which the parties agreed “this Court shall retain jurisdiction ... for purposes



1 of construction, modification, and enforcement.” *Brill*, 937 F. Supp. at 176; Dkt. 11 at 4.

2       The government also suggests that even if the Court grants X Corp. relief, the FTC could  
3 assert that the Consent Order is still effective. Opp. 21. In doing so, the government asks the Court  
4 to endorse a heads-I-win-tails-you-lose construction under which the FTC can select the most  
5 favorable aspects of federal court jurisdiction and then retreat back to the safety of its administrative  
6 order when X Corp. asserts its rights. Having submitted this matter to the Court’s continuing  
7 jurisdiction in order to invoke its penalty powers, the FTC should not be heard to argue that the  
8 Court’s judgment has no force or effect on its investigation. The FTC cannot “unilaterally obliterate  
9 a part of the consideration—indeed an important part—by which it secured [X Corp.’s] assent to be  
10 bound.” *Drive-X Co. v. Dixon*, 348 F.2d 342, 346 (D.C. Cir. 1965).

11       The FTC also argues that X Corp. is attempting to use its Motion as an end-run around  
12 administrative review. Opp. 12–13. But the FTC conflates 15 U.S.C. § 45(b), which concerns  
13 “cease and desist” “proceeding[s] by the Commission,” with Section 45(l), which was the  
14 mechanism for the government to file this case in federal court and obtain monetary relief. None of  
15 the decisions on which the government relies concerned injunctions under Section 45(l). Nor does  
16 the government offer any other explanation for why a party to a judicially supervised consent order  
17 with a federal agency must seek the agency’s permission before seeking relief or that such consent  
18 order should be subject to special procedures dictated by the agency. A consent order “embodies  
19 an agreement of the parties and is also an agreement that the parties desire and expect will be  
20 reflected in, and be enforceable as, a judicial decree that is subject to the rules generally applicable  
21 to other judgments and decrees.” *Frew v. Hawkins*, 540 U.S. 431, 437 (2004).

22       In any event, the FTC has it backwards—it threatens to use administrative proceedings to  
23 short circuit judicial authority to grant relief from court judgments. The rule of administrative  
24 exhaustion guards against “premature judicial intervention into the administrative process,” before  
25 an agency has had a chance to pass on a matter “in the first instance.” *Daly-Murphy v. Winston*,  
26 837 F.2d 348, 354 (9th Cir. 1987); *Atl. Ref. Co. v. FTC*, 381 U.S. 357, 377 (1965). But here, the  
27 government submitted this matter to a federal court more than a year ago, and this Court reduced it  
28 to a judgment. Further “construction, modification, and enforcement” of that judgment—including

1 the integrated Consent Order—is explicitly a matter for the Court, not the FTC. Dkt. 11 at 4. This  
 2 procedural posture results directly from the government’s choices. If the FTC had sought a cease-  
 3 and-desist order under Section 45(b) without involving the Court, then X Corp. might be required  
 4 to exhaust administrative remedies before seeking judicial review. But by invoking the Court’s  
 5 authority to obtain relief it could not achieve on its own, the FTC “consented to judicial  
 6 involvement” thereafter. *U.S. ex rel. Schweizer v. Océ N.V.*, 677 F.3d 1228, 1236 (D.C. Cir. 2012).

### 7 **III. THE COURT SHOULD GRANT A PROTECTIVE ORDER AGAINST MR.** 8 **MUSK’S DEPOSITION**

9 The Court should grant X Corp.’s request for a protective order against the FTC’s attempt  
 10 to depose Mr. Musk. Much of the government’s argument rests on the false premise that the FTC’s  
 11 demand to depose Mr. Musk was administrative, not judicial, because the “the FTC has not invoked  
 12 judicial process.” Opp. 23. False. The FTC noticed Mr. Musk’s deposition pursuant to Rule 30 of  
 13 the Federal Rules of Civil Procedure and this court case. Dkt. 18-11, 18-12. Having invoked those  
 14 authorities, the FTC must also respect the protections they afford to every litigant, including the  
 15 protections of the apex doctrine. The Opposition fails to justify the FTC’s attempt to go straight to  
 16 the top of X Corp.’s leadership in contravention of that rule.

17 For the same reason, the Opposition’s argument that the apex doctrine does not apply in  
 18 administrative proceedings is a non-sequitur. The FTC’s own deposition notices demonstrate that  
 19 this investigation is unfolding under the auspices of the Court’s authority pursuant to the Federal  
 20 Rules of Civil Procedure, not in an FTC administrative proceeding governed by different procedural  
 21 rules. The Stipulated Order provides that the FTC may obtain discovery “using any of the  
 22 procedures prescribed by Federal Rules of Civil Procedure 29, 30 [], 31, 33, 34, 36, 45, and 69.”  
 23 Dkt. 11 at 20. As the FTC has recognized, the apex doctrine “arises out of the Federal Rules of  
 24 Civil Procedure.” Ex. 22, Order on Pet. to Quash, *Amazon.com, Inc.*, No. 212 3050, at 16 (Sept. 21,  
 25 2022). Courts in this district apply the apex doctrine under the Federal Rules of Civil Procedure.  
 26 *See Apple Inc. v. Samsung Elecs. Co.*, 282 F.R.D. 259, 263 (N.D. Cal. 2012). The government  
 27 cannot ask the Court to ignore that rule because it could have proceeded under a different paradigm  
 28 in which it might not apply. *See Mattingly v. United States*, 939 F.2d 816, 818 (9th Cir. 1991)



1 (“[W]hen the United States comes into court as a party in a civil suit, it is subject to the Federal  
2 Rules of Civil Procedure as any other litigant.”).

3 The Opposition fails to demonstrate that the FTC’s attempt to depose Mr. Musk as its very  
4 first currently employed witness is appropriate. “[T]he closer that a proposed witness is to the apex  
5 of some particular peak in the corporate mountain range, and the less directly relevant that person  
6 is to the evidence proffered in support of his deposition, the more appropriate the protections of the  
7 apex doctrine become.” *Apple Inc.*, 282 F.R.D. at 263. As the majority shareholder and former  
8 CEO of X Corp., there can be little doubt Mr. Musk sits at the summit of X Corp.’s corporate  
9 structure. His deposition is only appropriate if he has “unique first-hand, non-repetitive knowledge  
10 of the facts at issue in the case,” and the government “has exhausted other less intrusive discovery  
11 methods.” *Id.* at 263. The FTC cannot satisfy either element.

12 The Opposition argues that Mr. Musk possesses unique knowledge because he was “deeply  
13 involved in the ‘fundamental transformation’ of X. Corp.,” which allegedly created “a serious  
14 concern” about the company’s adherence to the Stipulated Order. Opp. 24. If a generalized  
15 knowledge about large-scale changes at an organization were enough to justify an apex deposition,  
16 the apex doctrine would be a nullity. *See In re Google Litig.*, No. C 08-03172 RMW (PSG), 2011  
17 WL 4985279, at \*2 (N.D. Cal. Oct. 19, 2011) (rejecting attempt to depose Google founder Sergey  
18 Brin because of lack of evidence of “unique and first-hand knowledge of the facts of this case” and  
19 opposing party’s failure to “exhaust[] other less intrusive methods of discovery”). Nearly every  
20 high-level executive can be said to possess some such broad knowledge about an organization and  
21 its strategic decisions. *See Anderson v. Cnty. of Contra Costa*, No. 15-CV-01673-RS (MEJ), 2017  
22 WL 930315, at \*4 (N.D. Cal. Mar. 9, 2017) (denying request to depose under the apex doctrine  
23 where individual was “not an appropriate witness for general information regarding ... policies and  
24 practices” which are “topics of general application”). The Court should reject the FTC’s attempt to  
25 go straight to the top of the organization, which is precisely what the apex doctrine protects against.

26 There is no legitimate question that the FTC could opt for “less intrusive discovery methods”  
27 than the deposition of Mr. Musk. *Apple, Inc.* 282 F.R.D. at 263. The Opposition argues that the  
28 agency had to focus on former employees because of departures during the transition period. Opp.

25. But X Corp. still has many employees working in roles that oversee or support its compliance with the Stipulated Order and who have direct, day-to-day, current knowledge about those efforts. For example, the independent assessor conducted “walkthroughs and working sessions with all Control Owners and relevant Program team members,” and also interviewed 11 knowledgeable senior employees, including the company’s Global Data Protection Officer, Privacy Leads, Security Engineering Leads, cybersecurity Detection and Response Team leads, and a Privacy Program Manager, in order to conduct its assessment. Ex. 21 at 5, 200. The FTC has not sought to depose any of those individuals and instead insists that it must interview Elon Musk himself before anyone else. At a minimum, the Court should require the FTC to exhaust less intrusive methods of discovery before seeking an apex deposition.

#### **IV. THE COURT SHOULD COMPEL THE FTC TO RESPOND TO X CORP.’S DISCOVERY DEMANDS**

The limited record into which X Corp. has insight is sufficient to warrant termination or modification of the Consent Order for the reasons demonstrated above. The blatantly improper attempts to influence EY’s assessment, the politically motivated timing of the FTC’s investigation, its relative lack of interest in serious allegations about pre-Musk issues, and the unjustified demand to depose Mr. Musk all reinforce that conclusion. But further discovery is imperative. The Court should compel the FTC to respond to X Corp.’s discovery demands in order to illuminate the extent, intent, and effect of the agency’s misconduct and bias.

Courts compel discovery from administrative agencies based on “substantial allegations” of inequitable conduct or abuse of judicial process. *See* Mot. 20–21. The government glosses over most of X Corp.’s authority and argues that *SEC v. McGoff* renders them all inapplicable to this matter. Opp. 22 (citing 647 F.2d 185, 193 (D.C. Cir. 1981)). Not so. *McGoff* did not cabin the principles of *United States v. Fensterwald*, 553 F.2d 231, 232–33 (D.C. Cir. 1977), or the many other decisions X Corp. cited, to actions involving an agency’s “subpoena enforcement action.” Opp. 22. Nor could it have, since *Fensterwald* itself involved a motion to quash an agency summons filed by the *recipient*, not an attempt by the agency to enforce its demands. 553 F.2d at 232 (noting that *Fensterwald* “initiated discovery by filing interrogatories directed to the IRS as the opposing

1 party in his action . . . to quash the IRS summons.”). Rather, the *McGoff* court found the facts at  
 2 issue bore “scant resemblance” to *Fensterwald*, because McGoff could “point to nothing concrete”  
 3 to back up his allegations. 647 F.2d at 193. In contrast, X Corp.’s allegations are based on the  
 4 sworn testimony of the independent assessor that the FTC itself approved. That is a far cry from  
 5 the “diffuse speculations” in *McGoff*. *Id.* at 194. Like *Fensterwald*, X Corp. has based its discovery  
 6 demands on specific allegations of an “extraordinary harassing investigation.” 553 F.2d at 232.

7 The government’s attempt to characterize X Corp.’s discovery demands as an impermissible  
 8 disruption of a pre-enforcement investigation is also misplaced. Opp. 21–22 (citing *Genuine Parts*  
 9 *Co. v. FTC*, 445 F.2d 1382, 1387–88 (5th Cir. 1971)). The circumstances of this case differ  
 10 materially from *Genuine Parts*, where the subject of the FTC investigation alleged no agency  
 11 misconduct or bias. 445 F.2d at 1387. Here, however, X Corp. has established serious FTC  
 12 misconduct, bias, and harassment of X Corp. that must be developed further through discovery.

### 13 CONCLUSION

14 For the foregoing reasons, the Court should (1) terminate, modify, or stay enforcement of  
 15 the Consent Order; (2) issue a protective order staying the notice of deposition issued to Elon Musk  
 16 by the FTC; and (3) order the FTC to respond to X Corp.’s discovery requests and stay all  
 17 enforcement of the Consent Order—including X Corp.’s obligations to respond to demand letters  
 18 and produce witnesses for deposition—until the FTC has done so.

19 DATED: October 11, 2023

Respectfully submitted,

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